IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 65 OF 2015

DR. CHANDRAKANT SONTAKKI (SINCE DECEASED) REP. THROUGH HIS LEGAL REPRESENTATIVES., ... Appellant

Versus

M/S AASHIANA CONSTRUCTIONS, REP. BY THROUGH ITS PARTNERS. ... Respondent

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Mr. Sagar Malkarnekar, Advocate for the Appellant.

CORAM:- C. V. BHADANG, J.

DATE : 29th SEPTEMBER, 2015

ORAL ORDER:

Heard Mr. Malkarnekar, the learned Counsel for the appellant.

2. In this Second Appeal, the challenge is to the judgment and order passed by the first Appellate Court on 04.12.2014 in Regular Civil Appeal No. 71/2013, by which the first Appellate Court has modified the rate of interest granted by the Trial Court

from 18% per annum to 6% per annum on the decreetal amount. The appellants are the legal representatives of the original plaintiff, who was the purchaser and there were two agreements executed between the original plaintiff and the first respondent, which is a partnership firm, represented by respondent nos. 2 to 4, who are its partners. The learned Trial Court by judgment and order dated 28.02.2013 has decreed the suit in the sum of Rs.12,09,952/- alongwith interest at the rate of 18% per annum from the date of filing the suit, till its payment, alongwith costs. The first Appellate Court while dismissing the appeal had reduced the rate of interest to 6% per annum. The challenge is only to this part of modification, as to the rate of interest.

3. The learned Counsel for the appellant has submitted that the trial Court has rightly found in para 38 of the judgment that this being a commercial transaction, the interest should be granted at the rate of 18% per annum. It is submitted that the first Appellate Court on an erroneous appreciation of the terms of the agreement dated 22.08.1996 has reduced the rate of interest. The learned Counsel would submit that the first Appellate Court

has relied on para 3 of the agreement, while according to the learned Counsel for the appellants the issue would be governed by para 9 of the agreement.

4. I have considered the submissions and perused the judgment and order passed by the Courts below. Para 3 of the first agreement envisages a situation where the agreement is terminated by the Builder (i.e. the respondents) on account of the default committed by the purchasers (i.e. the appellant), while para 9 of the first agreement contemplates a situation where the agreement is terminated by the purchaser on account of a default made by the Builder. In this case it is undisputed that the agreement was terminated by the respondents i.e. the Builder. It is therefore difficult to accept that the dispute would be governed by para 9 of the first agreement. In that view of the matter when, admittedly the agreement was terminated by the Builder, the terms of para 3 of the first agreement would apply. Para 3 of the first agreement reads as under:

> *"If the purchaser commits default in payment of any of the aforesaid amounts strictly within the time aforesaid (time being the essence of*

> *the contract) and/or in observing and in performing any of the terms and conditions of this Agreement, the Builder shall be at liberty to terminate this Agreement. The Builder shall however on such termination, refund to the purchaser the part payment/s which may have been paid until then by the purchaser to the Builder, but without any further amounts by way of interest or otherwise, and on the Builder terminating this agreement under this clause, he shall be at liberty to sell off the said premises to any other person as the Builder deems fit, as such price as the Builder may determine and the purchaser shall not be entitled to question such sale or to claim any amount from the Builder."*

5. It can thus be seen that in a situation governed by para 3, no interest was payable by the Builder. The first Appellate Court has found and to my mind rightly so, that in terms of the contents of the first agreement, no interest was payable and having regard to the provisions of Section 34 of the Civil Procedure Code, the interest was reduced to 6% per annum. It is trite that future interest is always in the discretion of the Court. Albeit, such

a discretion is judicial in nature and has to be exercised in the facts and circumstances of each case. The first Appellate Court on appreciation of the terms of the agreement has rightly reduced the rate of interest from 18% per annum to 6% per annum. Thus, I do not find that the appeal raises any substantial question of law.

In the result, the Second Appeal is hereby dismissed.

C. V. BHADANG, J.

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